ZAKARIA JAAFAR & TAN POH HEE

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
MOHTAR ABDULLAH JC
[CRIMINAL APPLICATION NO. 44-2 OF 1989 & 44-4 OF 1989]
9 JULY 1989

CONSTITUTIONAL LAW: *Application for writ of habeas corpus - Detention order - Dangerous Drugs (Special Preventive Measure) Act 1985 - Extension order issued - Whether valid - Whether Advisory Board wrong in recommending further extension - Whether there is non-compliance with arts. 151(1)(a), 5(3) of the Constitution.*

This case involves two *habeas corpus* applications. Both applicants were arrested and detained under the Dangerous Drugs (Special Preventive Measure) Act 1985. The 1st applicant Zakaria bin Jaafar was arrested on 29 January 1986 and was ordered to be detained for a period of 2 years from 2 October 1986. This duration was subsequently extended to another 2 years from the expiry of its then current duration i.e., 1 October 1988.

The 2nd applicant contended that the extension order was illegal and invalid in that it had authorised the detention of the 2nd applicant until 30 September 1990 which is beyond the life-span of the Act which will expire on 14 June 1990 and this will be in violation of Article 5(1) of the Constitution.

The first common ground relied on by the 1st and 2nd applicant is that the Advisory Board had been wrong in recommending that the detention of the applicants be further extended and that the Minister wrongly considered the report of the Advisory Board. Secondly, that there has been non-compliance with Article 151(1)(a) of the Constitution in that the applicants were denied of their rights to make representations. Thirdly that there was a contravention of Article 5(3) of the Constitution in that the applicants were not informed of the grounds of their arrest as soon as may be. Fourthly that there is a contravention of s. 10(2) of the Act in that there is no communication of the decision or direction of the Yang di-Pertuan Agong to the Minister regarding the recommendation of the Advisory Board.

Held:

[1] The mere fact that the Advisory Board has exceeded its power by including a recommendation for the extension of the detention orders is not automatically fatal and does not *ipso facto* taint the decision of the Minister. It is the Minister's power under s. 11A of the Act on the facts available before him to decide and direct that any detention order be extended. The Court cannot go behind the Minister's subjective satisfaction.

[2] The denial to the applicants to make a second representation against their continued detention based on the same grounds is not an infringement of their right to representation guaranteed by Article 151(1)(a) of the Constitution. An opportunity to make representation should be given only if there are fresh grounds alleged against him.

[3] There is no right for the applicant to make representation against the Minister's directions since their continued detention is based on the same ground on which their original detention order was based. The Minister cannot confer and the applicant cannot acquire any legal right which the law does not provide.

[4] The arresting officers are senior officers in a specialised agency dealing in drug cases and it is quite reasonable and probable that the grounds of arrest were recited to the applicants. In the absence of any evidence to the contrary, the applicants had been properly informed of the grounds of their arrest and that there has been no infringement by the detaining authority of Article 5(3) of the Constitution.

[5] Concerning the contention that there is no communication of the Yang di-Pertuan Agong's decision or direction to the Minister as regards the confirmation of the detention order by the Yang di-Pertuan Agong, the fact that the detention orders were extended would imply their confirmation by the Yang di-Pertuan Agong.

Cases referred to:
Re Tan Boon Liat @ Allen & Anor. Et Al. [1977] 2 MLJ 108
Chng Suan Tze & Ors. v. The Minister of Home Affairs & Ors. [1989] 1 SCR 103

For the applicants - Teh Poh Teik; M/s. Abdul Rahman Saad & Associates
For the respondents - Abu Samah Nordin (SFC)

JUDGMENT

Mohtar Abdullah JC:

These two *habeas corpus* applications were heard together with the consent of all parties concerned. For ease of reference, I shall refer to Zakaria bin Jaafar as the 1st applicant, and Tan Poh Hee as the 2nd applicant.

Both applicants were arrested and detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 (hereinafter referred to as "the Act"). The 1st applicant was arrested on 29 January 1986. The detention order, dated 18 March 1986, signed by the then Deputy Minister of Home Affairs, Dato' Radzi Tan Sri Sheikh Ahmad, authorised his detention for a period of 2 years from 29 March 1986. The present Deputy Minister of Home Affairs, Dato' Megat Junid Bin Megat Ayob, (hereinafter referred to as "the Minister") subsequently directed that the duration of the detention order be extended for another period of 2 years with effect from the expiry of its then current duration, i.e., 28 March 1988.

The 2nd applicant was arrested on 4 August 1986. The Minister issued the detention order, dated 1 October 1986, for a period of 2 years with effect from 2 October 1986 and subsequently extended its duration by another 2 years with effect from the expiry of its then current duration, viz., 1 October 1988.

In his written "Skeletal Points of Argument" and his oral submission before me, Counsel for the applicants repeatedly used the phrase "extension detention order" loosely to refer to the direction of Minister under s. 11A(3) of the Act that the duration of the detention order be extended for such period specified by the Minister. What is in existence, in fact and in law, is one order of detention (made under s. 6 of the Act) the duration of which is being extended for the further period of two years in the case of each applicant. A proper reading of the language and purport of s. 11A bears this out. The Minister's direction for the extension of the detention order follows closely the language of s. 11A. The Minister's direction is not a second detention order! In my view the loose use of the phrases "extension detention order" (as used by Counsel) and "original order", "the first detention order" and "extension order" (as used in some of the earlier judgments of the High Court) may unfortunately give rise to the impression that there are, in the circumstances, two separate detention orders when the Minister invokes his power under s. 11A. As I said earlier, in law and in fact, there is only one detention order. However, in the special circumstances set out in Clause (3) of s. 11A,

where the direction for the extension of the duration of the detention order is made on different grounds or partly on the same grounds and partly on different grounds from the grounds on which the detention order was originally made, it is treated as if it is a fresh detention order - and the provisions of s. 9 (Representation against detention order) and s. 10 (Report of Advisory Board) "shall apply to such direction **as if the direction were a fresh detention order**". Section 11A confirms that in reality there's only one detention order, the duration of which can be extended on the same or on fresh grounds, with the additional safeguard of permitting the detained person to make representation against the fresh grounds alleged against him.

I shall now deal first with the submission made by Counsel on behalf of the 2nd applicant that the so-called "extension detention order" is illegal and invalid in authorising the detention of the 2nd applicant until 30 September 1990, beyond the life-span of the Act which will expire on 14 June 1990. By *Gazette* Notification PU(B) 305/85, dated 12 June 1985, pursuant to s. 1(2) of the Act, the Act was brought into force for a period of 5 years with effect from 15 June 1985. Unless otherwise extended by Parliament, the Act will lapse on 14 June 1990. In short, Counsel argues that the Minister cannot direct that the duration of the detention order be extended up to 30 September 1990 when at the time of making the said direction, the Act is only valid up to 14 June 1990. Thereof, it is further argued, there is a violation of Article 5(1) of the Constitution in that the detention of the 2nd applicant was not made in accordance with law as the Act under which the 2nd applicant is detained will no longer be valid law after 14 June 1990. Attractive though this argument might seem at first, it cannot hold water. Though, to date, Parliament has not yet passed any resolution pursuant to s. 1(4) it can do so at any time before the Act lapses. Parliament, if it so desire, has still nearly one year to do so! In any event, the detention order would be valid and legally enforceable only during the period the Act remains in force. Section 1(5) is a clear answer to the 2nd applicant's objection. Section 1(5) reads:

> (5) upon the expiration of this Act:
>
> (a) any person detained in police custody under s. 3 shall forthwith be released; and
>
> (b) any order under s. 6 or 7 shall cease to have effect and:
>
> (i) the officer in charge of any place of detention shall forthwith release from custody every person detained therein pursuant to a detention order made under s. 6 or 7; and
>
> (ii) the Chief Police Officer of the State or Federal Territory within which a person subject to a restriction order made under s. 6 or 7 resides shall forthwith inform such person that he has ceased to be subject to the restrictions and conditions imposed by such order.

This ground therefore fails.

The other grounds relied on by Counsel on behalf of the 1st and 2nd applicants are the same, and I shall deal with them together.

Common Ground (a): That the Advisory Board wrongly recommended that the detention of the applicants be further extended and that the Minister wrongly considered the Report of the Advisory Board.

The Advisory Board is statutorily bound to review the applicants' case and submit a written report of such review to the Minister. The mere fact that the Advisory Board has exceeded its power by including a recommendation for the extension of the detention orders is not

automatically fatal and does not *ipso facto* taint the decision of the Minister. Whether the Minister, in taking into account the Advisory Board's report which contains the offending recommendation, is acting in a manner prejudicial to any detained person is a question that can only be answered on the facts and circumstance of each particular case. It is the Minister's power under s. 11A of the Act, on the facts available before him, to decide and direct that any detention order be extended. The Minister by his Affidavit in each of these cases, has categorically affirmed as follows:

(a) that although the Advisory Board did recommend that the detention order be extended, he did not consider himself bound by it under the law, nor was he prejudiced by it;

(b) that he received reports and information from the Police seeking that the detention orders against the applicants be extended;

(c) that after careful consideration of all the reports and information submitted before him, he was satisfied that the applicants be further detained, and accordingly he directed that the duration of the detention order in respect of each applicant be extended for a further period of two years commencing immediately upon the expiration of the then current duration of the respective detention order on the same grounds on which the respective detention order was originally made;

(d) that in the final analysis, though the various reports and information were submitted to him for consideration, he made his own decision to extend the detention orders against the applicants after being satisfied that the applicants' further detention was necessary on the same grounds on which the respective detention order was originally made.

The Court cannot go behind the Minister's subjective satisfaction so unequivocally stated, and neither can such satisfaction be impugned by any extraneous matter that has crept into the report of the Advisory Board. The issue here is the Minister's satisfaction before he exercised his powers under s. 11A to extend the duration of the respective detention order - and on the evidence before this Court the answer is crystal clear.

At this juncture, I respectfully refer to two recent decisions of High Court in Seremban (*Ng Choon Mon v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.*) and in Johor Bahru (*Chua Teck v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors.*) where the detention order were invalidated on, *inter alia*, this ground. The facts in these two cases are quite different. In *Ng Choon Mon's* case there were two conflicting affidavits by the same Minister as regards the application of his mind to the Advisory Board's report which contained the objectionable recommendation. It is clearly therefore distinguishable from the unequivocable affidavit of the Minister in these present cases. In *Chua Teck's* case there was no categorical affirmation, as in the present case, that *inter alia*, he was not bound by the Advisory Board's recommendation nor was he prejudiced by it. In the light of the categorical affirmation by the Minister in his affidavit in the present cases, *Chua Teck's* case is clearly distinguishable.

This ground also fails.

Common Ground (b): That there has been non-compliance with Article 151(1)(a) of the Constitution in that the applicants were denied of their right to make representation.

The applicants complained that the authorities have failed to give them the opportunity of making representation against the so-called "extension detention order". As I had earlier pointed out, there is in law and in fact only one detention order against each applicant. In the case of the applicants, the direction of the Minister to extend the duration of the order was made on the same grounds on which their respective order was originally made. As I

stated earlier, Clause 3 of s. 11A provides additional safeguards, within the spirit of Article 151(1)(a) of the Constitution, to a detained person in case fresh grounds are to be considered against him. It is only right and fair that opportunity be given to a detained person to make representation against any fresh ground alleged against him. I hold that the denial to the applicants to make a second representation against their continued detention based on the same grounds is not an infringement of their right to representation as guaranteed by Article 151(1)(a) of the Constitution. Clause 3 of s. 3 of s. 11A is not *ultra vires* the Constitution.

This ground also fails.

Common Ground (c): That once the Minister has represented to the applicants that they have a right to make representation, the Minister cannot by way of subsequent conduct or omission deny the applicants of this right.

The applicants complained that although a copy of the direction for extension of the detention order had been served on the applicants (which the 2nd applicant refused to acknowledge), the applicants were neither given a copy of the notice informing them of their right to make representation nor a copy of the from to enable them to make the said representation. In the light of my findings on the common ground (b) above, this ground also fails. There is no right for the applicants to make representation against the Minister's direction that the duration of the detention order be extended on the same grounds respectively. Even if the Minister has made such representation to the applicants (which in these cases is clearly not done by the Minister), the Minister cannot confer, and the applicants cannot acquire, any legal right which the law does not so provide.

Common Grounds (d): That there was a contravention of Article 5(3) of the Constitution in that the applicants were not informed of the grounds of their arrest as soon as may be.

This objection relates back to the arrest of the applicants on 29 January 1986 and 4 August 1986 respectively. The 1st applicant (*vide* further affidavit by his wife affirmed on 29 April 1989) contends that he was not informed by the Police of the reasons for his arrest until about 5 days later. The 2nd applicant (*vide* his brother's further affidavit affirmed on 28 April 1989) contends that he was never informed by any police officer of the grounds of his arrest - "when the applicant asked one of the arresting officers as to why he was arresting him, the said officer answered that the applicant ought to know", It is also further contended that throughout his detention under police custody he was never informed of the grounds of his arrest.

It is interesting to note that the 1st applicant's wife and the 2nd applicant's brother both stated the wrong date of arrest of the applicants in their respective affidavits.

On the other hand, ASP Sulaiman bin Menga Din who effected the arrest of the 1st applicant affirmed that he informed the first applicant of grounds of his arrest in the following word:

> Bahawa kamu ditangkap di bawah Seksyen 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 kerana kamu telah terlibat dalam aktiviti berhubungan dengan penglibatan dadah berbahaya dan adalah perlu bagi kepentingan awam kamu ditahan.

Similarly Inspector Nordin bin Abdul who arrested the 2nd applicant informed him of the grounds of his arrest in the same manner.

Counsel submits that the version of the arresting officers is not reasonable or probable. Unfortunately I cannot agree. These two arresting officers are Senior Police Officers attached to the Anti Narcotic Division of the Police Headquarters at Bukit Aman. They are officers in a specialised agency dealing with drug cases, and it is quite reasonable and probable that they did recite the grounds of arrest in the manner as stated in their respective affidavit. In the absence of any evidence to the contrary (apart from the applicants' allegations through the affidavits of third parties - the wife and brother), I accept the version of the police officers, and accordingly hold that the applicants had been properly informed of the grounds of their arrest, and consequently there has not been any infringement by the detaining authority of Article 5(3) of the constitution.

The ground also fails.

Common ground (e): That there is a contravention of s. 10(2) of the Act in that there is no communication of the decision or direction of the Yang di Pertuan Agong to the Minister regarding the recommendation of the Advisory Board.

Encik Khalid Bin Ahmad, the Secretary of Advisory Board, confirms that the Advisory Board:

(a) considered the 1st applicant's representation on 3 June 1986 and made its recommendation to the Yang di-Pertuan Agong on 6 June 1986;

(b) considered the 2nd applicant's representation on 28 October 1986 and made its recommendation to the Yang di-Pertuan Agong on 31 October 1986.

In both cases, he affirmed that "pursuant to the recommendation of the Advisory Board the Yang di-Pertuan Agong has confirmed the detention order made by the Minister under s. 6(1) of the Act against the applicant". Counsel contends that the above-mentioned statement by Encik Khalid is not admissible and offends against the hearsay rule. And consequently there is no admissible evidence as to the communication of the Yang di-Pertuan Agong's decision or direction to the Minister as regards the confirmation of the detention order by the Yang di-Pertuan Agong.

In Singapore, under s. 8(1) of the Singapore Internal Security Act the President's satisfaction is a condition precedent to the Minister's power to make a detention order, and consequently where a detention under s. 8(1) is challenged the respondent must in addition to producing the detention order also produce evidence of the President's satisfaction (see *Chng Sua Tze & Ors. v. Minister of Home Affair & Ors*.). The position is different in Malaysia. Under the Act the Yang di-Pertuan Agong's satisfaction is not a precondition to the Minister making a valid detention order. Section 10(2) provides that on receipt of the Advisory Board's report the Yang di-Pertuan Agong may in his discretion give any direction if he thinks fit to the Minister. If the detention order by the Minister is invalid even the confirmation of it by the Yang di-Pertuan Agong will not save it. (See: *Re Tan Boon Liat @ Allen & Anor. Et al*). In the present cases, the fact that the detention order were extended would imply their confirmation by the Yang di Pertuan Agong. In the spirit of Article 15(b) of the Constitution if the Yang di Pertuan agong has not so confirmed the orders, the applicant would not continue to be detained the Act. The confirmation of the detention order against each applicant is therefore not a crucial issue in the present *habeas corpus* proceedings, and Encik Khalid's statement on this point is quite unnecessary to the determination of the validity of the detention orders. Whether it is admissible or not, it does neither add to nor detract from the validity of the detention orders issued by the Minister.

I hold that this ground is without merit.

I have throughout been conscious of the basic principle that the grant of *habeas corpus* is of right and it is not within the discretion of the Court to issue or not to issue the order if the applicants are unlawfully detained. The observation by Lee Hun Hoe CJ (Borneo), in *Tan Boon Liat @ Allen's* case is very explicit:

> I also said that "it is part of the democratic process, even during national emergency, for the Court to be vigilant that emergency expedients do not exceed the real necessities of the situation." Further, preventive detention is a very serious invasion of personal liberty. Certain safeguards are provided by law for the protection of the subject and must be followed scrupulously. Where statutory requirements have to be complained with there must be strict compliance since it affects matters of such fundamental importance as the liberty of the subject. In *Ex Parte Johannes Choeldi & Ors*., Rigby J said to the effect that where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. Where the detention is not in accordance with law such detention is bad and the person is entitled to be released forthwith ... The function of Court is to interpret the law in accordance with established principles of construction.

I am satisfied that the detention of both applicants are in accordance with law and statutory procedure prescribed by law. Though the applicants are entitled to avail themselves of any technical defects which may invalidate the detention order, I find no technical defects which warrants the invalidation of the detention order against each applicant.

On the reasons stated above, these two applications are hereby dismissed.

Also found at [1989] 2 CLJ 1101